11-9-2009

State v. Felder Appellant's Brief Dckt. 35523

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 35523
	)	
v.	)	
	)	
KENNETH FRANKLIN FELDER,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE RONALD J. WILPER
District Judge

MOLLY J. HUSKEY
State Appellate Public Defender
State of Idaho
I.S.B. # 4843

SARA B. THOMAS
Chief, Appellate Unit
I.S.B. # 5867

HEATHER M. CARLSON
Deputy State Appellate Public Defender
I.S.B. # 7148
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

ATTORNEYS FOR
DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-RESPONDENT

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STATEMENT OF THE CASE

Nature of the Case

Kenneth Franklin Felder appeals from the district court's Judgment and Commitment Order sentencing him to concurrent sentences of twenty five years, with ten years fixed, following his conviction on three counts of lewd conduct. Mr. Felder asserts that his rights to due process and a fair trial, guaranteed by the United States and Idaho Constitutions, were violated because of the prosecutor's misconduct in this case. Mr. Felder also contends the district court abused its discretion when it sentenced him to concurrent sentences of twenty five years, with ten years fixed.

Statement of the Facts and Course of Proceedings

In 2007, Mr. Felder was indicted on three counts of lewd conduct with a minor under sixteen for acts allegedly committed against his step-daughter, A.K. (R., pp.12-13.) The case proceeded to trial and a mistrial was declared after the jury informed the court it was deadlocked. (R., pp.74-75.) Approximately two months later, a new trial was held. (R., pp.80-90.) At trial, Mr. Felder maintained his innocence testifying that he had never inappropriately touched A.K. (Trial Tr., p.289, L.20 – p.290, L.1.)

Mr. Felder was married to A.K.'s mother for approximately three and one-half years prior to the trial in this case. (Trial Tr., p.257, Ls.15-20.) Mr. Felder testified that after he moved in, A.K. hated him because he was not her father and he was strict. (Trial Tr., p.262, Ls.6-17.) Mr. Felder described himself as having "this anal thing about cleaning" and liked things clean at all times. (Trial Tr., p.263, Ls.2-5.) He expected everyone to carry their own weight and help with the chores. (Trial Tr., p.263, Ls.9-17.) He testified that A.K. had a bigger role than the other children in cleaning because she

was older and taller. (Trial Tr., p.263, Ls.9-17.) Although A.K.'s mother would also sometimes help around the house, she would play on the computer a lot, leaving Mr. Felder to do most of the cleaning as well as supervising the children while they did their chores. (Trial Tr., p.263, Ls.20-25.) Mr. Felder testified that he was basically the disciplinarian for the household. (Trial Tr., p.264, Ls.1-3.)

A.K. and Mr. Felder frequently clashed over chores and these clashes could go on for hours in an attempt to get A.K. to do her chores. (Trial Tr., p.264, Ls.4-12, p.267, Ls.9-18.) Mr. Felder testified that A.K.'s resentment got worse once her father went into the military and her mother began working nights. (Trial Tr., p.262, Ls.6-17, p.267, Ls.9-18.)

At trial, Mr. Felder also admitted that he had a bad temper, describing himself as having "a bad anger problem and a short temper." (Trial Tr., p.268, Ls.2-23.) Mr. Felder stated that he lost his temper with A.K. more times than he should have and that on one occasion he had spanked A.K. with a wooden spoon and told her not to tell because he was afraid her mother would get angry. (Trial Tr., p.269, Ls.4-24.) Mr. Felder testified that, the Sunday before he was arrested, he and A.K. had clashed after he asked her and her sister to clean up their room. (Trial Tr., p.272, L.9 – p.274, L.2.) Mr. Felder explained that A.K. swore at him a couple times and that he lost his temper, "grabbed ahold of her, pinned her up against the wall, and cussed her out," and punched the wall right next to her head. (Trial Tr., p.274, Ls.8-22.)

Mr. Felder testified that the next day he and his wife were called down to the police station and he was told that A.K. had alleged that he had inappropriately touched her. (Trial Tr., p.275, L.24 – p.277, L.20.) Mr. Felder explained that during the interview

they threatened to take the children away, including his son, who he had worked hard to get custody of. (Trial Tr., p.279, L.8 – p.281, L.25.) Mr. Felder testified that because he was afraid the children would be taken away, he eventually admitted to inappropriately touching A.K. (Trial Tr., p.281, Ls.14-25.) At trial, Mr. Felder testified his statements to officers were not true and that he had never inappropriately touched A.K. (Trial Tr., p.289, L.20 – p.290, L.1.)

At trial, A.K. testified that Mr. Felder would touch her and licked her where she went pee, as well as touch her butt and breasts. (Trial Tr., p.50, L.1 – p.75, L.9.) She testified that Mr. Felder would touch her in this manner when he was tucking her in for bed and that this conduct occurred frequently from the time she was in third grade until she reported the inappropriate touching in fifth grade. (Trial Tr., p.49, L.3 – p.75, L.9.) After watching a movie on inappropriate touching at school, A.K. told her friend who went with A.K. to the counselor to report that Mr. Felder had inappropriately touched A.K. (Trial Tr., p.67, L.23 – p.69, L.21.)

Officer Zakarian of the Meridian police department testified that he had interviewed Mr. Felder following A.K.'s report. (Trial Tr., p.208, L.10 – p.209, L.4, p.215, L.12 – p.218, L.10.) He testified that, although Mr. Felder was very reluctant to directly answer his questions about touching A.K. inappropriately, Mr. Felder eventually admitted to touching A.K. inappropriately five to ten times. (Trial Tr., p.218, L.6 – p.223, L.16.) Officer Zakarian stated the Mr. Felder stated that he touched A.K. to harass her because she did not show him respect or treat him right. (Trial Tr., p.225, Ls.1-7.)

Mr. Felder was found guilty of all three counts of lewd conduct with a minor under sixteen. (R., pp.91-92.) Mr. Felder was subsequently sentenced to concurrent

sentences of twenty five years, with ten years fixed. (R., pp.97-99.) He filed a timely Notice of Appeal from the district court's Judgment of Conviction. (R., pp.101-03.) He also filed an Idaho Criminal Rule 35 (*hereinafter,* Rule 35) motion asking that the district court reduce his sentence. (R., pp.110-15.) The district court denied this motion. (R., pp.115-18.)[1]

[1] Because no new or additional information was provided in support of Mr. Felder's Rule 35 motion, this issue is not being pursued on appeal. *See State v. Huffman,*144 Idaho 201, 203,159 P.3d 838, 840 (2007)

ISSUES

1. Did the State violate Mr. Felder's right to a fair trial, guaranteed by the Fifth and Fourteenth amendments to the United States Constitution and Article I, § 13 of the Idaho Constitution, by committing multiple acts of prosecutorial misconduct during closing arguments?

2. Did the district court abuse its discretion when it sentenced Mr. Felder to twenty five years, with ten years fixed, to be served concurrently, for three counts of lewd conduct?

ARGUMENT

I.

The State Violated Mr. Felder's Right To A Fair Trial, Guaranteed By The Fifth And Fourteenth Amendments To The United States Constitution And Article I, § 13 Of The Idaho Constitution, By Committing Multiple Acts Of Prosecutorial Misconduct During Closing Arguments

A. Introduction

Mr. Felder asserts that the prosecutor violated his right to a fair trial, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, § 13 of the Idaho Constitution, when she impermissibly vouched for the victim and appealed to the passions and prejudices of the jury. Furthermore, this prosecutorial misconduct committed during closing arguments amounted to fundamental error and this Court should vacate Mr. Felder's conviction in light of this misconduct.

B. Standard Of Review

Prosecutorial misconduct will only be reviewed for fundamental error absent an objection below. *State v. Field,* 144 Idaho 559, 571, 165 P.3d 273, 285 (2007). The Idaho Courts have noted that when reviewing fundamental error each case will "stand on its own merits" and "[o]ut of the facts in each case will arise the law." *State v. Christiansen,* 144 Idaho 463, 470, 163 P.3d 1175, 1182 (2007) (quoting *State v. Bingham,* 116 Idaho 415, 423, 776 P.2d 424 432 (1989)).

C. Fundamental Error Occurred In This Case When The State Violated Mr. Felder's Right To A Fair Trial By Committing Multiple Acts Of Prosecutorial Misconduct During The Closing Arguments

Although there was no objection to the prosecutor's comments during closing arguments in this case, prosecutorial misconduct can be reviewed for fundamental error

when there has not been an objection made below. *See State v. Field,* 144 Idaho 559, 571, 165 P.3d 273, 285 (2007); *State v. Kuhn,* 139 Idaho 710, 715, 85 P.3d 1109, 1114 (Ct. App. 2003). A fundamental error is one that "'so profoundly distorts the trial that it produces manifest injustice and deprives the accused of his constitutional right to due process.'" *State v. Christiansen,* 144 Idaho 463, 470, 163 P.2d 1175, 1182 (2007) (quoting *State v. Sheahan,* 139 Idaho 267, 281, 77 P.3d 956, 970 (2003); *State v. Mauro,* 121 Idaho 178, 180, 824 P.2d 109, 111 (1991)). It has been defined as an error which "goes to the foundation or basis of a defendant's rights or...to the foundation of the case or take[s] from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive." *Id.* (quoting *State v. Bingham,* 116 Idaho 415, 423, 776 P.2d 424, 432 (1989)).

The Idaho Court of Appeals has held that "[p]rosecutorial misconduct rises to the level of fundamental error when it is calculated to inflame the minds of the jurors and arouse prejudice or passion against the defendant, or is so inflammatory that the jurors may be influenced to determine guilt on factors outside the evidence." *Kuhn,* 139 Idaho at 715, 85 P.3d at 1114. The prosecutor's actions or comments must be so egregious or inflammatory that a curative jury instruction could not have remedied the misconduct. *Id.* This reflects the rationale behind the rule, that even if the defendant had made a timely objection to the inflammatory statements, the objection would not have cured the inherent prejudice. *Id.* This also reflects the fact that the trial court itself possesses the power to *sua sponte* intervene when prosecutorial misconduct is sufficiently egregious and prejudicial. *State v. Phillips,* 144 Idaho 82, 88 n.2, 156 P.3d 583, 589 n.2 (Ct. App. 2007) (noting that "[t]he trial courts of this state possess authority and are encouraged

to monitor the course of closing arguments, to *sua sponte* intervene as warranted, and to impose remedies or sanctions as appropriate to protect an accused's right to a fair trial"). Therefore, when reviewing a question of prosecutorial misconduct, the appellate Court must first determine whether the complained about conduct was improper, then, if so, whether the misconduct impinged on the defendant's right to a fair trial, or whether the misconduct was harmless. *Kuhn,* 139 Idaho at 715, 85 P.3d at 1114.

In this case, the prosecutor committed misconduct amounting to fundamental error during the closing arguments by impermissibly vouching for the victim and impermissibly appealing to the passions and prejudices of the jury.

1. The Prosecutor Improperly Vouched For The Victim In This Case During Her Closing Arguments

Although the prosecutor is given considerable latitude in his argument and can permissibly discuss the evidence and the inferences and deductions arising from the evidence, the prosecutor should not express his personal opinion regarding the credibility of a witness unless the comment is based solely on the evidence presented at trial. *Kuhn,* 139 Idaho at 715, 85 P.3d at 1114. Improper prosecutorial vouching occurs when the prosecutor uses the prestige of his office to bolster the witness by providing his assurances in the witnesses' testimony or when the prosecutor indicates that there is information that was not presented to the jury that would support the witnesses' testimony. *Smith,* 962 F.2d at 933-34. Two dangers are presented by a prosecutor's vouching for a witness. *United States v. Weatherspoon,* 410 F.3d 1142, 1147-1148 (9th Cir. 2004) (quoting *U.S. v. Young,* 470 U.S. 1, 18-19 (1986)). Vouching can "convey the impression that evidence not presented to the jury, but known to the prosecutor,

supports the charges against the defendant" jeopardizing the defendant's right to a fair trial. *Id.* Furthermore, "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *Id.* "'Vouching for a government witness in closing argument has often been held to be plain error, reviewable even though no objection was raised.'" *Frederick,* 78 F.3d at 1379 (quoting *United States v. Roberts,* 618 F.2d 530, 534 (9th Cir. 1980)

This case essentially revolved around whether the jury believed the victim's allegations against the defendant; therefore, establishing the witness as credible was important for the State. Unfortunately, in attempting to do this, the prosecutor went too far and vouched for its witness in its closing arguments. In closing the prosecutor explained:

> For you to believe that [A.K.] would somehow be able to make up these allegations that somehow in doing so, that the state would be able to wrap itself around the allegations and just happen to find all of these coincidences would make you think that [A.K.] is so sophisticated and so smart that she could fool people who do this every day....

(Trial Tr., p.339, Ls.13-20.) The prosecutor then went on to explain how A.K.'s disclosures corresponded with when the defendant began having sole care of her and how she later became disconnected at school. (Trial Tr., p.339, L.20 – p.340, L.6.) By arguing that A.K. would have to fool people who do this everyday, including the prosecutor's office, in attempting to explain why she was believable, the prosecutor was implicitly saying that the State believes her and the State would not be able to find all the coincidences if she was not believable. Although the State could certainly argue that her disclosures coincided with certain facts in this case, by placing itself in the

arguments and implying that the victim could not fool the State, the prosecutor was vouching for the believability of A.K.

Earlier in the State's closing argument, the prosecutor made similar statements explaining that if A.K. had made inconsistent statements they would have heard about it. Specifically, the prosecutor stated:

> She tells her friend. Her friend encourages her to tell Ms. Hensley. She goes to CARES. She tells CARES what happened. And ladies and gentlemen, what is important about all of this is that each of these persons has come to testify, not her letter friend..., but all these other people have come. And if she had said anything inconsistent, [A.K] had been inconsistent with Ms. Hensley, with CARES, with what the police understood, you would have heard about it.
>
> You would have heard about it in cross examination. You would have heard how he brings out inconsistencies in [A.K.'s] stories, just as the state did with the defendant and how inconsistent he has been throughout his entire testimony today with what he told Detective Zakarian seven and a half months ago. You see, you would have known if [A.K.] had been inconsistent about any of it, but you never heard about it at all.

(Tr., p.328, L.14 – p.329, L.8.) This argument similarly vouches for the victim, implying that the prosecutor knows A.K. has never been inconsistent.

In *Washington v. Hofbauer,* 228 F.3d 689 (6th Cir. 2000), the Sixth Circuit Court of Appeals found that similar arguments were misconduct. *Id.* at 700-01. In *Hofbauer,* the prosecutor characterized the victim's testimony as being consistent over time, explaining that several witnesses had testified and that the victim's story had not changed. *Id.* at 700. The court found that this was misrepresenting facts in evidence because none of the witnesses had actually testified to what the victim had told them; therefore, no evidence was presented to the jury regarding whether or not the victim's story had changed. *Id.* The court also noted that if the State had sought to elicit such testimony it would have been inadmissible hearsay. *Id.* at 700-01. The court further

found that the purpose of the prosecutor's statements were to improperly bolster the credibility of the victim, citing the prosecutors statement, "'You think that a ten year old is going to go through all of that, fool everybody, talking about two instances'" as further proof of vouching. *Id.* at 701.

Here, the prosecutor's argument was similar to *Hofbauer,* arguing that the jury did not hear any inconsistencies. In addition to vouching for A.K.'s credibility, this second statement also similarly misrepresented facts in evidence. *See Phillips,* 144 Idaho at 86, 156 P.3d at 587 (stating it is misconduct to mischaracterize the evidence and argue facts not in evidence.). *See also State v. Raudebaugh,* 124 Idaho 758, 770, 864 P.2d 596, 608 (1993) ("[A] prosecutor has a duty to avoid mischaracterizing evidence and using inflammatory tactics in closing arguments); *State v. Lovelass,* 133 Idaho 160, 983 P.2d 233 (1999). Here, the witnesses also would not have simply been allowed to testify regarding statements made by the victim unless a hearsay exception was met. *See* I.R.E. 801; I.R.E. 803. Furthermore, although defense counsel could have tried to impeach A.K. with inconsistent statements, this also assumes that defense counsel knew inconsistent statements were made. Finally, the prosecutor's argument also shifted the burden to the defense, implying that it was the defense's burden to show that the A.K.'s statements were inconsistent. *See Phillips,* 144 Idaho at 86, 156 P.3d at 587 (explaining it is misconduct to misrepresent the law or the reasonable doubt burden). *See also State v. Miles,* 139 Wash. App. 879, 162 P.3d 1169 (Wash. App. Div.2. 2007) ("Although prosecutors have "wide latitude" to make inferences about witness credibility, it is flagrant misconduct to shift the burden of proof to the defendant.")

Therefore, Mr. Felder contends the prosecutor committed misconduct when she made statements during closing argument vouching for the credibility of A.K. and which also misrepresented the facts in evidence and shifted the burden to the defense.

2. The Prosecutor Impermissibly Appealed To The Jury's Emotions In Her Closing Arguments

In her closing arguments, the prosecutor also improperly appealled to the emotions, passions, or prejudices of the jury by the use of inflammatory tactics designed to appeal to the jurors' emotions. *See Phillips,* 144 Idaho at 86-87, 156 P.3d at 587-88. It is improper for a prosecutor to urge jurors to convict a criminal defendant by appealing "to the passions, fears and vulnerabilities of the jury." *Weatherspoon,* 410 F.3d at 1149; *Phillips,* 144 Idaho at 86-87, 156 P.3d at 587-88. This includes urging a conviction to protect community values, preserve civil order, or deter future lawbreaking. *Weatherspoon,* 410 F.3d at 1149. The problem with appeals to emotion is that it encourages the jury to convict the defendant based on reasons entirely separate from his own guilt or innocence. *Id. Phillips,* 144 Idaho at 87, 156 P.3d at 588 (quoting *State v. Irwin,* 9Idaho 35, 43-44, 71 P. 608, 609-11 (1903) ("'Nothing should tempt [the prosecutor] to appeal to prejudices, to pervert the testimony, or make statements to the jury, which whether true or not, have not been proved.'").

When asking the jury to convict Mr. Felder, the prosecutor told the jury "in this instance, [A.K.] should be seen and heard and believed by you. Convict him for what he has done to her." (Trial Tr., p.340, Ls.14-18.) These statements by the prosecutor are appealing to the emotions of the jury and a sense of community justice by asking the jury to convict the defendant not based on the evidence admitted at trial but to show

the young victim that they believe her and to convict the defendant for the alleged harm that he has caused her rather than based on the evidence. Therefore, it was misconduct for the prosecutor to make these statements.

3. The Prosecutorial Misconduct Was Not Harmless And Deprived Mr. Felder Of His Right To A Fair Trial

"[E]ven when prosecutorial misconduct has resulted in fundamental error, the conviction will not be reversed when that error is harmless." *State v. Field,* 144 Idaho 559, 571, 165 P.3d 273, 285 (2007). In the present case, this Court should find that the misconduct denied Mr. Felder his right to a fair trial because it cannot say beyond a reasonable doubt that the jury would have returned the same verdict if the misconduct had not occurred. As set forth above, the improper statements by the prosecutor each individually, or alternatively, viewed as a whole, cannot be harmless. *See State v. Harrison*, 136 Idaho 504, 37 P.3d 1 (Ct. App. 2001) (holding that under the doctrine of cumulative error, the, "accumulation of irregularities, each of which in itself might be harmless, may in the aggregate show the absence of a fair trial.").

In this case, the credibility of the victim played an important role. The State emphasized that the question in this case was whether the jury believed the victim or Mr. Felder in its closing arguments. (Tr., p.327, Ls.15-24.) Mr. Felder also testified that he had never touched A.K. inappropriately. (Trial Tr., p.289, L.20 – p.290, L.1.) Therefore, by vouching for the victim and her credibility or believability as a witness as well as appealing to the jurors' emotions, the State's misconduct easily could have contributed to the verdict and cannot be said to be harmless.

II.

The District Court Abused Its Discretion When It Sentenced Mr. Felder To Twenty Five Years, With Ten Years Fixed, To Be Served Concurrently, For Three Counts Of Lewd Conduct

Mr. Felder asserts that, given any view of the facts, his concurrent sentences of twenty five years, with ten years fixed, are excessive. Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771, 653 P.2d 1183 (Ct. App. 1982).

The Idaho Supreme Court has held that, "'[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.'" *State v. Jackson*, 130 Idaho 293, 294, 939 P.2d 1372, 1373 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577, 602 P.2d 71, 75 (1979)). Mr. Felder does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Felder must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* citing *State v. Broadhead*, 120 Idaho 141, 145, 814 P.2d 401, 405 (1991), *overruled on other grounds by State v. Brown*, 121 Idaho 385, 825 P.2d 482 (1992). The governing criteria, or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.* (quoting *State v. Wolfe*, 99 Idaho 382, 384, 582 P.2d 728, 730 (1978)). Mr. Felder contends the district court failed to adequately consider the mitigating factors present in this case when sentencing him,

including his the fact this was Mr. Felder's first felony conviction, Mr. Felder's positive employment history, and his support from family and friends.

The Idaho Supreme Court has "recognized that the first offender should be accorded more lenient treatment than the habitual criminal." *State v. Hoskins*, 131 Idaho 670, 673, 962 P.2d 1054, 1057 (1998). Additionally, the Court has also considered the defendant's employment history and the support the defendant has from his family and friends in his rehabilitation efforts. *State v. Nice*, 103 Idaho 89, 91, 645 P.2d 323, 325 (1982) (reducing the defendant's sentence in light of the defendant's substance abuse problem, the fact is it was the defendant's first felony, and the fact the defendant was working to help support his children at the time of his conviction); *State v. Shideler*, 103 Idaho 593, 594-595, 651 P.2d 527, 528-529 (1982) (reducing sentence of defendant who had the support of his family and employer in his rehabilitation efforts).

This was Mr. Felder's first felony offense. (Presentence Investigation Report (*hereinafter,* PSI), pp.3-4.) Prior to this offense, Mr. Felder continuously maintained employment, sometimes working two jobs at once. (PSI, p.20.) He was working at Fleetwood Homes of Idaho until the instant offense occurred and had "good skills in janitorial services, construction and sheet metal." (PSI, p.10.)

Mr. Felder also has the support of his family and friends in his rehabilitation efforts, receiving letters in support from several family members and friends. (*See* Letters from Jonathan W. Fouts, Lori Farrens, Rocky Farrens, Mary A. Schukman, Kim Felder, Justin and Kris Farrens, Kathy A. Atwood, William Felder, Mary Gadbery, Sarah Jeffries and Rana Reynolds attaches to the PSI.) Mr. Felder was described as "a good

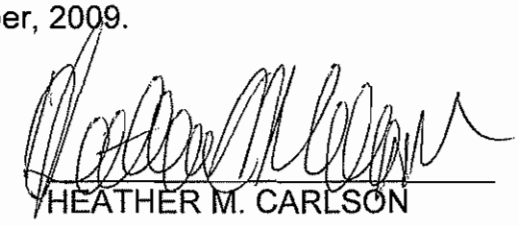
hearted person who is caring, respectful and a great listener" who worked hard to support his family. (Letter from Jonathon W. Fouts attached to the PSI; see also Letters from Mary A. Shukman, Lori Farrens, and Kathy A. Atwood attached to the PSI.) Mr. Felder "would give you the shirt off his back, whether you needed it or not." (Letter from Rocky Farrens attached to the PSI.) His sister, Kim Felder, described him as the best big brother anyone could ask for. (Letter from Kim Felder attached to the PSI.) His nieces also described Mr. Felder as a loving uncle, who was always there for them and who had never touched them inappropriately. (Letters from Mary Gadbery and Sarah Jeffries attached to the PSI.) Mr. Felder's father stated that Mr. Felder was welcome to come live with him in Arizona if he were released and that there were already job opportunities for him if he did so. (Letter from William Felder attached to the PSI.)

Mr. Felder contends the district court should have adequately considered the mitigating circumstances in his case, including the fact that this was his first felony, his positive employment history and the support he received from family and friends. Therefore, he contends his concurrent sentences of twenty five years, with ten years fixed are excessive.

CONCLUSION

Mr. Felder respectfully requests that this Court vacate his conviction and remand his case for a new trial. Alternatively, Mr. Felder respectfully requests that this Court vacate his sentence and reduce his sentence as it deems appropriate, or remand his case to the district court for a new sentencing hearing.

DATED this 9th day of November, 2009.



HEATHER M. CARLSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 9th day of November, 2009, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

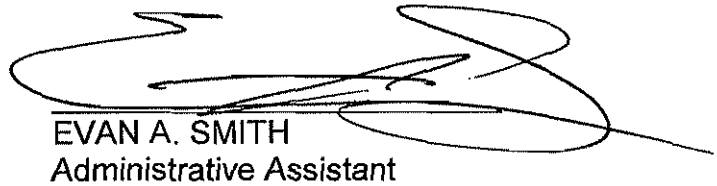
KENNETH FRANKLIN FELDER
INMATE # 89622
ICC
PO BOX 70010
BOISE ID 83707

RONALD J WILPER
DISTRICT COURT JUDGE
E-MAILED COPY OF BRIEF

ADA COUNTY PUBLIC DEFENDER'S OFFICE
200 W FRONT ST
BOISE ID 83702

STATEHOUSE MAIL

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010
Hand deliver to Attorney General's mailbox at Supreme Court



EVAN A. SMITH
Administrative Assistant

HMC/eas